



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CIVIL APPEAL NO. 246 OF 2013

MICHAEL KUNGU KIGIAAPPLICANT/PLAINTIFF

VS

MERU TEACHERS HOUSE LTD..... RESPONDENT/DEFENDANT

RULING

This ruling concerns 2 applications by the applicant. One is dated 6/5/2013 and the other one is dated 5/6/2013. This ruling mainly deals with the application dated 6/5/2013 as the application dated 5/6/2013, as will be seen later, is easily dismissed.

The application dated 6/5/2013 states that it is premised on sections 3 and 3A of the Civil Procedure Act and Order 42 Rule 6 and Order 51 of the Civil Procedure Rules. It seeks Orders;-

1. **THAT this Honourable Court be pleased to grant an order for stay of execution of Judgment/decree dated 19th April, 2013 in business premises rent tribunal NO. 16 of 2012 pending the hearing and determination of this appeal.**
2. **THAT costs of this application be provided for.**

The application was supported by 22 grounds and a supporting affidavit.

The application was heard exparte on 7th May, 2013 when this court sought to have the matter heard by the division of the High Court dealing with commercial disputes. As the court later agreed that it possessed Jurisdiction, it granted Interim Orders on 8/5/2013. I directed that the application be heard inter-partes on 31/5/2013.

However, before the application could be heard inter parties, the Deputy Registrar brought to my attention an undated letter written by the applicant and filed on 28th May, 2013.

The letter, addressed to the Deputy Registrar, asked that this matter be heard by another Judge. It also claimed that several advocates had confirmed to the applicant that Mr Nyamu Nyaga, the advocate for the applicant, had boasted that he would “use all means” to frustrate the applicant and ensure that no court would hear him. As proof of this claim, the applicant said that Mr Nyaga was enjoying what was happening in court on 7/5/2013 when this court had sought to have this matter transferred to the High Court instead of its being heard by the Environmental and Land Court. I take the view that the applicant was subtly insinuating that, as a Judge, I was party to the alleged conspiracy against the applicant. As the applicant's letter was copied to the firm of Nyamu Nyaga & Co, Advocates, Mr Nyaga wrote back and

sought to controvert the applicant's claims through a letter he addressed to the Deputy Registrar to which he attached an affidavit with several annexures. I wish to clear the air and point out that the applicant expressed his confidence in the court on 31/5/2013.

In his affidavit, Mr Nyaga categorically denied the allegations made against him by the applicant. He prayed this court to order a thorough investigation of the applicant's allegations and that appropriate action be taken against the author. He said that the applicant was a bitter man who was in the habit of making all manner of allegations against him whenever he lost a case against his client M/S Meru Teachers House Limited. He deponed that since the year 1999, the applicant had filed 24 cases against Meru Teachers House and that in all the applicant had filed over 31 cases. He annexed as "DNN1" a summary of a list of cases between the appellant and the respondent as follows;-

a. **MATTERS PENDING AT THE TRIBUNAL**

1. BPRT CASE NO. 2/2012.

b. **MATTERS CONCLUDED AT THE TRIBUNAL IN 2012.**

1. BPRT CASE NO. 17/2012
2. BPRT CASE NO. 19/2011
3. BPRT CASE NO. 28/2011
4. BPRT CASE NO. 9B/2010
5. BPRT CASE NO. 29/2010
6. BPRT CASE NO. 10/1999

100. **MATTERS CONCLUDED AT THE TRIBUNAL IN 2013.**

1. BPRT CASE NO. 16/2012

d. **MATTERS PREVIOUSLY CONCLUDED AT THE TRIBUNAL**

1. BPRT CASE NO. 8/2005
2. BPRT CASE NO. 14/2005 (WITHDRAWN)
3. BPRT CASE NO. 15/2005
4. BPRT CASE NO. 6/2004
5. BPRT CASE NO. 7/2002

e. **MATTERS PENDING IN THE MAGISTRATE'S COURT.**

1. CMCC MISC APPLNO. 20/2011 (pursuing orders in BPRT CASE No. 19/2011)
2. CMCC MISC APPL NO. 38/2011 – (pursuing orders in BPRT CASE NO. 28/2011)
3. CMCC MISC APPL NO. 29/2010
4. CMCC CASE No. 174/2009
5. CMCC CASE NO. 130/2005
6. CMCC CASE NO. 153/97 (pursuing costs only)
7. CMCC CASE NO. 123/2012 (formerly HCC No.64/07)

f. **MATTERS CONCLUDED BY THE MAGISTRATE'S COURT.**

1. CMCC MISC APPL NO. 48/2005
2. CMCC CASE NO. 793/99 (withdrawn)

g. **MATTERS PENDING IN THE HIGH COURT – MERU**

1. HCA NO. 246/2013 – (Pending Appeal)

2. HCC CIVIL APPL NO. 78/2012 – (Pending Appeal)
3. HCC MISC APPL. NO. 13/2011 (Pursuing costs only)
4. HCC MISC APPL. NO. 94/2011 (Pursuing costs only)
5. HCC CIVIL APPL. NO. 126/2009 (KNUT matter)

h. MATTER PENDING IN THE HIGH COURT – NAIROBI

1. HCC MISC APPL NO. 501/2010

(i) MATTERS PREVIOUSLY CONCLUDED AT THE HIGH COURT.

1. HCC MISC APPL. NO. 116/2010.
2. HCC MISC APPL. NO. 196/2002
3. HCC MISC APPL. NO. 145/2010- (TRANSFERRED TO NAIROBI HIGH COURT)

Mr Nyamu Nyaga by proffering this summary to court sought to buttress his assertion that the applicant was ill-disposed towards him as he had lost quite a number of these cases in which the advocate represented the respondent.

The applicant sought to rebut what was deponed by Mr. Nyaga through a letter addressed to the Deputy Registrar and containing an affidavit with 37 paragraphs. Having looked at the issues deponed by both the respondent's advocate and by the applicant, it is my view that they will be best considered at the hearing of the appeal, when and if it is admitted.

On 31/5/2013 the applicant's application dated 6/5/2013 could not be heard as the applicant claimed that the respondent had not served him with responses to his application.

Before the original application could be heard inter parties the applicant filed another application dated 5/6/2013 in which he sought the striking out of averments filed in court through the firm of Nyamu Nyaga & CO Advocates as he claimed that they had not been instructed by the respondent and that the firm had not filed a Notice of Appointment.

I directed that this application dated 5/6/2013 and the original one dated 6/5/2013 be heard concurrently on 10/7/2013.

At the outset, after perusal of the averments by both parties, I find that the firm of Nyamu Nyaga & Co, Advocates, was properly on record and do dismiss the application dated 5/6/2013 and direct that costs thereof be in the cause.

I will now deal with the application dated 6/5/2013. During inter-parties hearing the applicant, *inter alia*, argued that the respondent's advocate had filed documents when he was not properly on record. According to him a decision based on documents improperly filed must be set aside. His other submissions mainly touched upon matters which can only be properly ventilated during the appeal. However, it is clear that the applicant sought to demonstrate that he had an arguable case during the appeal.

The respondent sought to controvert the assertions of the applicant. However, many of the issues raised can only be properly and exhaustively ventilated during the appeal, if this matter proceeds to that stage.

I have looked at all the averments, the authorities proffered and the submissions of the parties. I do note that the applicant is aggrieved by the Judgment/Decree of the Business Premises Tribunal in case No. 16 of 2012 dated 19th April, 2013. The Judgment he seeks to appeal against was delivered by the Chairman of the Business Premises Rent Tribunal and orders as follows:-

1. **The landlord's notice dated 24/2/2012 is allowed.**

- 2. The tenancy is terminated, the tenant is ordered to vacate and hand over vacant possession within 30 days.**
- 3. The landlord is granted permission to levy distress under section 12 (1) (h) and recover the outstanding rent arrears.**
- 4. Costs to the landlord.**

The notice which was allowed by the Tribunal's Judgment indicates that monthly rent payable was Kshs 21,000/= and as such according to averments, the respondents claim against the applicant up to May 2013 was a sum of Kshs 756,000/= which when June, July and August, 2013 are taken into account makes a total of Kshs 819,000/=. This figure may deviate a little either upwards or downwards.

The applicant had on the face of the application indicated that, among other provisions of the law, it is premised on order 42 Rule 6 of the Civil Procedure rules. Order 42, rule 6, sub-Rule 2 requires that for stay of execution to be granted.

- 1. The applicant must satisfy the court that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay.**
- 2. The applicant must give such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.**

The words used in order 42 rule 6, sub-rule 2 is "shall". Both conditions must be satisfied. I am not fully satisfied that the applicant stands to suffer substantial loss if stay of execution is not granted. However, I am satisfied that this application was filed without unreasonable delay. I will give him the benefit of doubt regarding the issue of substantial loss.

It is noted that preliminary matters relating to the admission of the applicant's appeal have not been finalized. This is one of the main reasons, I will grant an order of stay of execution. It is, however, incumbent upon me to set apposite terms as mandatorily required by order 42, Rule 6, sub-rule 2 of the Civil Procedure Rules.

Stay of Execution is granted upon the following terms.

- 1. Security in the sum of Kshs 819,000/= be deposited into court by the applicant within 30 days of this ruling.**
- 2. The applicant to pay the monthly rent of Kshs 21,000/= to the respondent with effect from 1st September, 2013 and onwards.**

If the stipulated security is not deposited in court and as pellucidly declared by the Hon. Madan, JA, as he then was, in the Court of Appeal case of Butt Versus Rent Restriction Tribunal, 1982 KLR 417, the stay granted shall lapse without a further order of this court. The respondent will then be at liberty to execute the apposite Judgment/ Decree.

It is so ordered.

Delivered in open court at Meru this 8th day of August, 2013 in the presence of:-

Nyamu Nyaga for respondent.

Michael Kigia – Applicant.

P. M. NJOROGI

JUDGE